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Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROFESSORS OF FEDERAL JURISDICTION AND LEGAL HISTORY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors with expertise in federal jurisdiction and legal history who have an interest in the proper understanding and interpretation of the Judiciary Act of 1789 and of the provision of that Act commonly known as the Alien Tort Statute (ATS). Petitioner and other *amici* who have already filed briefs in this case have advanced certain arguments that are, in our view, inconsistent with the history and text of the ATS. We respectfully submit this brief in order to clarify the history of the ATS and how that history bears upon its proper interpretation. We take no position on the second question presented (the law-of-nations standard for determining which torts are actionable under the ATS) or on the third question presented (whether the specific torts at issue in this case are actionable under the ATS).

SUMMARY OF ARGUMENT

Section 9 of the First Judiciary Act provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." An Act to establish the Judicial Courts of the United States ("Judiciary Act"), ch. 20, § 9, 1 Stat. 73,

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[1] No counsel for any party authored this brief in whole or in part. No person or entity other than the *amici curiae* or their counsel made any monetary contribution to the preparation and submission of this brief. Petitioner and respondent have given blanket consents to the filing of *amicus* briefs. The written consent of the United States accompanies this brief.

77 (1789). This provision, commonly known as the Alien Tort Statute ("ATS"), is now codified at 28 U.S.C. § 1350.[2]

Petitioner argues that the First Congress did not intend for aliens to be able to bring suits under the ATS for torts in violation of the law of nations unless Congress passed a further statute authorizing such suits. Other *amici* argue in the alternative that jurisdiction under the ATS is limited to a category of suits narrower than "all causes where an alien sues for a tort only in violation of the law of nations." 1 Stat. at 77. As a historical matter, these arguments are mistaken. The history and text of the ATS establish three basic propositions: (1) the First Congress intended to provide a *federal forum* for alien tort suits; (2) the First Congress understood such suits to be cognizable *at common law* without the need for further congressional action; and (3) the First Congress intended the district courts to have jurisdiction over "*all*" such torts, not just those that occurred within the territory of the United States or those that were recognized in 1789.[3]

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[2] As presently codified, § 1350 reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. It has never been suggested that any change in wording upon codification was intended to alter the scope of this provision.

[3] As Professor Casto has noted, "[n]otwithstanding frequent complaints about the obscurity of section 1350's origins, a thorough study of available historical materials provides a fairly clear understanding of the statute's purpose." William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-89 (1986); *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985); Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221 (1996).

ARGUMENT

Properly framed, the question in this case is not whether the ATS itself creates a cause of action, but rather whether the First Congress understood that further congressional action would be necessary before aliens could bring suits for torts in violation of the law of nations. Petitioner's argument assumes that a right to sue may be created only by statute. The history and text of the ATS demonstrate, to the contrary, that the First Congress understood that torts in violation of the law of nations were cognizable at common law. The history and text of the ATS further show that the First Congress intended to provide a federal forum for these suits and that the district courts' jurisdiction should extend to "all" such suits.

I. THE FIRST CONGRESS INTENDED TO PROVIDE A FEDERAL FORUM FOR CASES WHERE AN ALIEN SUES FOR A TORT ONLY IN VIOLATION OF THE LAW OF NATIONS.

Under the Articles of Confederation, the national government had little authority to provide remedies for violations of the law of nations. This experience proved to the First Congress the importance of providing a federal forum for such violations. As James Madison complained, "[t]hese articles [of confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42, at 264, 265 (J. Madison) (C. Rossiter ed.,

1961). Although suits for torts in violation of the law of nations could have been brought in state court, the Framers thought a federal forum was important in order to promote uniformity in the interpretation of the law of nations, because they feared that state courts might be hostile to alien claims, and because they felt it was their duty to provide that the law of nations be respected and obeyed.

A. THE EXPERIENCE UNDER THE ARTICLES OF CONFEDERATION DEMONSTRATED THAT TORTS IN VIOLATION OF THE LAW OF NATIONS SHOULD NOT BE LEFT EXCLUSIVELY TO THE STATES.

The problem of redressing violations of the law of nations arose repeatedly during the decade before passage of the First Judiciary Act, and the Continental Congress consistently demonstrated its concern with providing not just criminal penalties but also civil damages. As early as 1779, the Congress wrote to assure the Minister Plenipotentiary of France that the courts "will cause the law of nations to be most strictly observed: that if it shall be found, after due trial, that the owners of the captured vessels have suffered damage from the misapprehension or violation of the rights of war or neutrality, Congress will cause reparation to be made . . ." 14 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 635 (W.C. Ford ed., 1909). But while the Articles of Confederation gave the national government and its courts authority over violations of the law of nations on the high seas, *see* ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 4, 6 (1778), the national government lacked authority over such violations on land.

To address this problem, the Continental Congress passed a resolution in 1781 recommending to the States that they "provide expeditious, exemplary and adequate punishment" for violations of the law of nations and treaties to which the United States was a party. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (G. Hunt ed., 1912). The resolution listed several law-of-nations violations, including violations of safe-conducts and "infractions of the immunities of ambassadors and other public ministers." *Id.*[4] It also recommended that the States "erect a tribunal in each State, or . . . vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration." *Id.* at 1137. Finally, the resolution recommended that the States "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.*[5] The Congress thus envisioned two types of civil suits: (1) tort suits by the

[4] The enumeration followed Blackstone, who stated that "[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 WILLIAM BLACKSTONE, COMMENTARIES *68. The resolution made no mention of piracy because Congress had exclusive authority under the Articles of Confederation to provide for the trial of piracies. *See* ARTICLES OF CONFEDERATION, art. 9, § 1, 1 Stat. 4, 6 (1778) ("The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas . . .").

[5] As Professor Casto has explained, "[t]he citizen limitation literally applies only to the indemnity action by the United States and is separated from the recommended alien's tort claim provision by a comma. This different treatment makes sense because it is very unlikely that the United States would pay compensation for an injury done by a non-citizen." Casto, *supra*, at 499 n.179.

injured party against the tortfeasor, and (2) suits by the United States against the tortfeasor to indemnify it for compensation paid to the injured party. This 1781 resolution of the Continental Congress is acknowledged to be "the direct precursor of the alien tort provision in the First Judiciary Act." Slaughter, *supra*, at 477; *see also* Dodge, *supra*, at 226-29; Casto, *supra*, at 490-91. The following year, Connecticut passed "An Act for securing to Foreigners in this State, their Rights, according to the Laws of Nations, and to prevent any Infractions of said Laws," which criminalized specific violations of the law of nations and "any other Infractions or Violations of or Offenses against the known received and established Laws of civilized Nations." *See* Acts and Laws of the State of Connecticut, in America 82, 83 (1784). The Connecticut act also provided a broad tort remedy for injuries "to any foreign Power, or to the Subjects thereof." *Id.*

The 1784 Marbois Affair highlighted the importance of redressing violations of the law of nations. In May 1784, the Chevalier De Longchamps, a French citizen, assaulted Francis Barbe Marbois, the French Consul General, on a Philadelphia street. *See Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 111 (1784). "The Marbois Affair was a national sensation that attracted the concern of virtually every public figure in America." Casto, *supra*, at 492. The French Ambassador formally complained to the Continental Congress, and the Dutch Ambassador threatened to leave the State unless action were taken. *See id.* at 491-92 & n.138. De Longchamps was ultimately tried and convicted by the Pennsylvania Supreme Court for an offense against the law of nations, which the court held to be "in its full extent, . . . part of the law of this State." *De Longchamps*, 1 U.S. (1 Dall.) at 116. But the national government was powerless. As the Congress explained to Marbois, its authority was limited by "the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree." 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 314 (J.C. Fitzpatrick ed., 1933). When a similar incident involving the Dutch Ambassador in New York City arose four years later, John Jay, then Secretary for Foreign Affairs, complained that "the foederal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 111 (R.R. Hill ed., 1937).

The new Constitution at last gave the national government authority to redress violations of the law of nations, and the First Congress acted swiftly to implement the recommendations of the 1781 resolution. It passed an act providing criminal penalties for violations of safe-conducts and assaults on ambassadors and public ministers. See An Act for the Punishment of certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790). It gave the federal courts jurisdiction over crimes "cognizable under the authority of the United States," Judiciary Act, ch. 20, §§ 9 & 11, 1 Stat. at 76-77, 78-79, which would have included both statutory and common-law offenses against the law of nations. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73, 77 (1923); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1016 (1985).[6]

[6] This Court later limited federal criminal jurisdiction to statutory offenses. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

And it implemented the 1781 resolution's recommendation on civil suits by granting the district courts jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act, ch. 20, § 9, 1 Stat. at 77. In each case, Oliver Ellsworth appears to have played a leading role. Ellsworth had been a member of both the Continental Congress that passed the 1781 resolution and the Connecticut General Assembly that passed the 1782 act. *See* Dodge, *supra*, at 231. He chaired the Senate committee that reported the Act for the Punishment of certain Crimes against the United States, *see* Casto, *supra*, at 495 n.156, and was the principal drafter of the First Judiciary Act, specifically authoring Section 9, which contains the alien tort provision.[7]

B. A FEDERAL FORUM WAS IMPORTANT TO PROMOTE UNIFORMITY, TO AVOID HOSTILE STATE COURTS, AND TO DISCHARGE THE NATION'S DUTY TO PROVIDE REDRESS FOR VIOLATIONS OF THE LAW OF NATIONS.

Suits for torts that violated the law of nations could have been brought in state courts, and indeed the ATS specified that the district courts' jurisdiction over these torts would be "concurrent with the courts of the several States." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77.[8] There were several reasons, however, for the First Congress to make a federal forum available. First, providing a federal forum would promote uniformity in the interpretation of the law of

[7] Section 9 of the Judiciary Act was Section 10 of the bill submitted to Congress, and this section appears in Ellsworth's handwriting. *See* Warren, *supra*, at 50, 73.

[8] Petitioner's arguments to the contrary are addressed at length in Part II.

nations. John Jay expressed this idea in defending the new Constitution's grant of judicial power:

> Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent . . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.

THE FEDERALIST NO. 3, at 41, 43 (J. Jay) (C. Rossiter ed., 1961); *see also* THE FEDERALIST NO. 80, at 475, 476 (A. Hamilton) (C. Rossiter ed., 1961) ("cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction.").[9]

Second, the First Congress had reason to fear that state courts would be hostile to aliens' claims. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53 (discussing the difficulties that British creditors had collecting their debts in state courts). As James Madison put it while defending the Constitution's grant of alienage jurisdiction: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 THE DEBATES IN THE SEVERAL

[9] The ATS did not guarantee uniformity in the interpretation of the law of nations, since aliens were free to bring their tort claims in state courts, but it at least gave aliens the option of seeking a uniform federal interpretation.

STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 1836).

Third, the First Congress viewed it as the duty of every government to provide redress for violations of the law of nations. Blackstone had written that "where the individuals of any state violate this general law [of nations], it is then the interest as well as *duty* of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained." 4 BLACKSTONE, *supra*, at *68 (emphasis added). In the *De Longchamps* case, the Pennsylvania Supreme Court had similarly emphasized that it was "the interest as well as *duty* of the government" to punish violations of the law of nations. *De Longchamps*, 1 U.S. (1 Dall.) at 117 (emphasis added). When the United States gained independence, that duty became its duty. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), Chief Justice John Jay observed that "the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their *duty* to provide, that those laws should be respected and obeyed." *Id.* at 474 (emphasis added). As Professor Slaughter has written, "[t]he Alien Tort Statue was a direct response to what the Founders understood to be the nation's *duty* to propagate and enforce those international law rules that directly regulated individual conduct." Slaughter, *supra*, at 475; *see also id.* at 481-88.

Petitioner would have this Court believe that Oliver Ellsworth and the other members of the First Congress, having been concerned to provide civil redress for violations of the law of nations for at least a decade, and having gone to the trouble to implement the recommendations of

the 1781 resolution in the Judiciary Act and other legislation, suddenly had second thoughts and decided not to enact the further statute necessary to authorize suits. There is no support in the historical record for this proposition. Instead, as explained below, it is clear that Congress thought no further statute was necessary because torts in violation of the law of nations were cognizable at common law.

II. THE FIRST CONGRESS UNDERSTOOD THAT TORTS IN VIOLATION OF THE LAW OF NATIONS WERE COGNIZABLE AT COMMON LAW WITHOUT THE NEED FOR FURTHER ACTION BY CONGRESS.

Congress did not create a statutory right of action for torts in violation of the law of nations because it did not believe that any was necessary. Professor Bradley has explained:

> [T]here would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary.

Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002).

A. THE LAW OF NATIONS WAS UNDERSTOOD TO BE PART OF THE COMMON LAW.

Blackstone had written that "the law of nations . . . is . . . adopted in it's [sic] full extent by the common law, and

is held to be a part of the law of the land." 4 BLACKSTONE, *supra*, at *67. In America, state and federal courts regularly applied the law of nations as common law in both criminal and civil cases. In convicting De Longchamps for the assault on Marbois by an indictment at common law, the Pennsylvania Supreme Court affirmed that "the law of Nations . . . , in its full extent, is part of the law of this State." *De Longchamps*, 1 U.S. (1 Dall.) at 116. During the 1790's, federal authorities also brought indictments at common law for violations of the law of nations. *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 842-45 (1989); Jay, *Origins*, *supra*. As Justice James Iredell stated when charging the grand jury in one of these prosecutions, "[t]he Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it." Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Jay, *Law of Nations*, *supra*, at 825.

The law of nations also applied as common law in civil cases. Blackstone reported, for example, that "in mercantile questions, such as bills of exchange and the like . . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to." 4 BLACKSTONE, *supra*, at *67. The same was true in America. In a comprehensive study of the subject, Professor Fletcher noted that "[a]ll American courts, state and federal, relied on the general law merchant in commercial cases." William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984); *see also* Curtis A.

Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 824 (1997) ("the law of nations . . . had the legal status of general common law").

As common law, the law of nations applied in both state and federal courts. Early American writers "generally asserted that the law of nations was part of the law of the new American states and their national government." Jay, *Law of Nations*, *supra*, at 825; *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) ("Early in our history, the question whether international law was state or federal law was not an issue: it was 'the common law.'"). Moreover, because it was part of the common law, the law of nations required no legislative enactment to be effective. As Attorney General Edmund Randolph noted in an early opinion, "[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land." 1 Op. Att'y Gen. 26, 27 (1792).

B. THE TEXT OF SECTION 9 MAKES CLEAR THAT NO FURTHER ACTION BY CONGRESS WAS NECESSARY.

The text of Section 9 confirms that no further action by Congress was necessary for suits to be brought under the ATS. First, there is the word "tort." Although "tort law was not a highly developed field" in the late eighteenth century, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 261 (1973), there is no escaping the fact that the First Congress deliberately used this word, which had a definite meaning. Blackstone used the word "tort" to describe actions "whereby a man claims a satisfaction in damages for some injury done to his person or property" such as

"actions for trespasses, nusances [sic], assaults, defamatory words, and the like." 3 WILLIAM BLACKSTONE, COMMENTARIES *117. Such actions required no statutory authorization, and the injured party might obtain a "remedy by suit or action in the courts of common law . . . ." 3 *id.* at *118; *see also* 3 *id.* at *123 ("wherever the common law gives a right or prohibits an injury, it also gives a remedy by action"). While Blackstone's discussion of offenses against the law of nations focused on criminal penalties, *see* 4 *id.* at *68-73, he understood that crimes and torts would sometimes overlap, noting that in cases of assault or battery, for example, "an indictment may be brought as well as an action; and frequently both are accordingly prosecuted: the one at the suit of the crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages." 3 *id.* at *121. Pennsylvania indicted De Longchamps at common law for "an infraction of the law of nations," *De Longchamps*, 1 U.S. (1 Dall.) at 116, but Marbois could also have brought a common-law tort action against De Longchamps for assault. To deny Marbois that right unless a statute specifically authorized the action would have been to treat torts in violation of the law of nations *less favorably* than other torts, and it strains belief to suggest that this was the Framers' understanding.

Second, the district courts' jurisdiction under the ATS was expressly made "concurrent with the courts of the several States, or the circuit courts, as the case may be." 1 Stat. at 77. The provision for jurisdiction "concurrent with . . . the circuit courts" confirms that suits for torts in violation of the law of nations were cognizable at common law, because the concurrent jurisdiction of the circuit courts could only have been the jurisdiction granted in Section 11

of the Judiciary Act over "all suits of a civil nature *at common law* or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." 1 Stat. at 78 (emphasis added). If Petitioner were correct that suits for torts in violation of the law of nations could only be brought under a federal statute and not at common law, then the circuit courts would have lacked jurisdiction over these cases under Section 11 and the ATS's reference to the concurrent jurisdiction of the circuit courts would be rendered meaningless. Finally, the fact that the district courts' jurisdiction under the ATS was to be "concurrent with the courts of the several States" belies Petitioner's assertion that suits for torts in violation of the law of nations could not be brought in state court. See Casto, *supra*, at 508-10.[10]

[10] Petitioner's argument that torts in violation of the law of nations could not be heard in state court rests heavily on the fact that the Continental Congress's 1781 resolution recommended that the States "authorise suits to be instituted for damages by the party injured" and that the 1782 Connecticut act did just that. Petitioner's Brief 21-23. From this, Petitioner infers that such suits could not otherwise have been brought. This inference is mistaken for three reasons. First, it ignores the fact that the law of nations was considered to be part of the common law. Second, it was not unusual for legislatures at that time to pass statutes that would limit, expand, or simply restate the law of nations. *See* Bradley, *supra*, at 595 ("The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1280 (1996) ("In essence, the law of nations operated as a set of background rules that courts applied in the absence of any binding sovereign command to the contrary."). Indeed, Blackstone viewed the acts of parliament dealing with the law of nations simply as restatements of the law that would have applied even in their absence. *See* 4 BLACKSTONE, *supra*, at *67 ("those acts of parliament, which have from time to time been made to enforce

Third, a comparison of Section 9's alien tort provision with the other clauses of Section 9 indicates that no further congressional action was necessary before suits could be brought. Section 9 contains six clauses vesting jurisdiction in the district courts, of which the ATS is the fourth. The first three clauses contemplated that Congress might enact legislation under which a criminal prosecution or civil suit could be brought, but the last three did not. The first, second, and third clauses of Section 9 gave the district courts jurisdiction over: (1) "all crimes and offences that shall be cognizable under the authority of the United States . . . where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted;"[11] (2) "all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States . . . ;" and (3) "all seizures . . . and . . . all suits for penalties and forfeitures incurred, under the laws of the United States." 1 Stat. at 76-77. If Congress passed criminal legislation, "laws of

this universal law, or to facilitate the execution of it's [sic] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom"). Third, both the 1781 resolution and 1782 Connecticut act did go beyond the existing common law, not by authorizing a suit for damages by the injured party but rather by authorizing an indemnity action by the United States if it chose to compensate the injured party out of the public treasury. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 1137; Acts and Laws of the State of Connecticut, in America, *supra*, at 83. The 1781 resolution and the Connecticut act were not superfluous, therefore, even though torts in violation of the law of nations were already cognizable in state courts at common law.

[11] In cases where the punishments exceeded those limits, jurisdiction was given to the circuit courts. 1 Stat. at 78-79.

impost, navigation or trade" providing for seizures, or other "laws of the United States" providing for penalties and forfeitures, these three clauses would provide the district courts with jurisdiction. It is worth noting, however, that at least with respect to the first two jurisdictional clauses further legislation was not necessary. Admiralty jurisdiction over prize cases and private disputes would exist without further congressional authorization, and it was assumed throughout the 1790's that the district courts would have jurisdiction over indictments at common law even in the absence of a federal criminal statute.[12]

The fourth, fifth, and sixth clauses of Section 9, on the other hand, gave the district courts jurisdiction over: (4) "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States;" (5) "all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars;" and (6) "all suits against consuls or vice-consuls . . ." 1 Stat. at 77. Importantly, in none of these clauses is there any mention of "laws of the United States," as one finds in Section 9's second and third clauses. The fifth clause clearly anticipates suits by the United States "at common law." So does the fourth, since the law of nations was understood to be part of the common law. *See*, *e.g.*, 4 BLACKSTONE, *supra*, at *67. And the

[12] As noted earlier, throughout the 1790's the United States continued to bring criminal indictments at common law, particularly for violations of the law of nations. *See* Jay, *Law of Nations*, *supra*, at 842-45; Jay, *Origins*, *supra*. Indeed, Ellsworth himself would instruct a grand jury that violations of the law of nations were punishable as common-law crimes. *See* Grand Jury Charge of Chief Justice Oliver Ellsworth, Circuit Court for the District of South Carolina (May 15, 1799), *reprinted in* Jay, *Origins*, *supra*, at 1114 app.

sixth, which was designed to protect foreign officials from being sued in state court, is broad enough to encompass suits at common law or pursuant to a statute.[13] Finally, it is worth noting that in the first three clauses, where Congress might have been expected to pass further legislation authorizing suits, the district courts' jurisdiction was exclusive of the state courts. By contrast, in the fourth and fifth clause, where suits were expected to be brought at common law, the district courts' jurisdiction was concurrent with that of the state courts.

Petitioner analogizes the ATS to the third clause of Section 9 providing for exclusive jurisdiction over "all suits for penalties and forfeitures incurred, under the laws of the United States." Petitioner's Brief 14. For Petitioner's analogy to work, however, the language of the ATS would have to provide jurisdiction over "all causes where an alien sues *under the laws of the United States* for a tort only in violation of the law of nations or a treaty of the United States." But the italicized language does not appear in the text that Congress passed. Surely the more apt analogy is to the fifth clause of Section 9 conferring jurisdiction over suits by the United States at common law, which like the ATS lacks the "under the laws of the United States" language and makes the district courts' jurisdiction concurrent with the courts of the several States.

In short, Petitioner's assertion that "[l]ike the other clauses of Section 9, the ATS granted district courts juris-

[13] Section 13 of the Judiciary Act further gave this Court original and exclusive jurisdiction over all suits against ambassadors, other public ministers, and their domestics and original but not exclusive jurisdiction over all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul was a party. 1 Stat. at 80-81. Again, this jurisdiction would have included suits at common law.

diction to hear causes of action that Congress created elsewhere," *id.* 12, is mistaken. Only the third clause of Section 9 required Congress separately to create a right to sue. The ATS, like each of the other clauses, did not.

C. CONTEMPORANEOUS INTERPRETATIONS OF THE ATS CONFIRM THAT NO FURTHER ACTION BY CONGRESS WAS NECESSARY TO AUTHORIZE SUIT.

Early interpretations of the ATS also show that aliens were presumed to have a remedy under the provision without the need for a further congressional enactment. In 1795, Attorney General William Bradford was asked to opine on the actions that might be taken against Americans who had helped the French attack the British colony of Sierra Leone. Bradford, who had been the Attorney General of Pennsylvania and chief prosecutor in the Marbois Affair, *see De Longchamps*, 1 U.S. (1 Dall.) at 113; Casto, *supra*, at 503 n.201, expressed some doubt whether the offenders could be criminally prosecuted in the courts of the United States. 1 Op. Att'y Gen. 57, 58-59 (1795). He continued:

> But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .

Id. at 59. In Bradford's view, no additional statute was necessary to authorize the aliens' suit. All that was needed for those injured to have "a remedy by a *civil* suit in

the courts of the United States" was the ATS's grant of "jurisdiction."[14]

The ATS was also interpreted in two federal cases during the 1790's. In *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607), a French privateer captured as prize a Spanish vessel carrying slaves mortgaged to a British citizen. In port, the mortgagee's agent seized and sold the slaves, and the privateer sued for the proceeds. There was some doubt that the suit fell within the district court's admiralty jurisdiction because the seizure had been made on land but, the court continued,

> as the 9th section of the judiciary act of congress . . . gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.

[14] Petitioner attempts to minimize the significance of this interpretation by arguing that "[a]t a time when the Washington Administration was stretching the common law past the breaking point to prosecute conduct that did not violate federal law . . . it is not surprising that the Attorney General would overstate the ATS's scope." Petitioner's Brief 38 n.13. In fact, Bradford's opinion was quite careful not to overstate the reach of federal criminal jurisdiction. He stated that "[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are *not* within the cognizance of our courts." 1 Op. Att'y Gen. at 58 (emphasis added). He further discussed the possibility of an indictment for crimes committed on the high seas, but thought U.S. jurisdiction doubtful because of the limits of the federal criminal statute. *See id.* at 58-59 ("But some doubt rests on this point, in consequence of the terms in which the 'Act in addition to the act for the punishment of certain crimes against the United States' is expressed."). These are not the words of a person who was overstating the reach of U.S. jurisdiction.

Id. at 810. The *Bolchos* court did not even consider the possibility that the privateer's tort suit could not be brought because Congress had not passed a separate statute authorizing it. In *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895), a French privateer captured a British ship within the territorial waters of the United States, and the owners sought restitution of the ship and its cargo as well as damages for its detention. The district court stated in dictum that the suit could not be maintained under the ATS—not because Congress had failed to pass a separate statute authorizing the suit, but because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.* at 948.

In sum, the language and structure of Section 9, as well as the contemporaneous interpretations of the ATS, confirm that no additional action by Congress was necessary to authorize alien tort suits. "In 1789, it was understood that the common law provided the right to sue for a tort in violation of the law of nations, just as it provided the right to sue for any other kind of tort." Dodge, *supra*, at 237-38.

III. THE FIRST CONGRESS INTENDED THE DISTRICT COURTS TO HAVE JURISDICTION OVER "ALL" CAUSES WHERE AN ALIEN SUES FOR A TORT ONLY IN VIOLATION OF THE LAW OF NATIONS.

Petitioner's *amici* suggest, in the alternative, that jurisdiction under the ATS should be limited to a subcategory of torts in violation of the law of nations. The United States suggests that this Court should apply the presumption against extraterritoriality and hold that the ATS reach-

es torts in violation of the law of nations only when they occur within the United States. *See* Brief for the United States as *Amicus Curiae* in Support of Petitioner 53-57. The Washington Legal Foundation suggests that this Court should limit the ATS to those torts that violated the law of nations in 1789. Brief of Washington Legal Foundation *et al.* as *Amici Curiae* in Support of Petitioner 9-13. The history and text of the ATS support neither interpretation.[15]

A. THE FIRST CONGRESS INTENDED THE ATS TO REACH TORTS IN VIOLATION OF THE LAW OF NATIONS THAT OCCURRED ABROAD.

The text of the ATS contains no geographical limitation, and "[t]he broad wording of the statute clearly encompasses torts without regard to the place of their commission." Casto, *supra*, at 503. This lack of geographical limitation

[15] *Amici* Professors of International Law, Federal Jurisdiction, and Foreign Relations Law briefly raise two other limiting constructions, neither of which is historically well-founded. First, they suggest that the ATS was meant to apply only to certain maritime torts. Brief for Professors of International Law *et al.* as *Amici Curiae* in Support of Petitioner 28. This suggestion, first made in Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995), distorts the text of the ATS and would have made it redundant because these same torts already fell within the district courts' admiralty jurisdiction. *See* Dodge, *supra*, at 243-56. Second, these *amici* suggest that the ATS was meant to apply only when the defendant was a U.S. citizen. Brief for Professors of International Law *et al.* as *Amici Curiae* in Support of Petitioner 28-29. This suggestion, made in Bradley, *supra*, would mean that cases like the Marbois Affair would be excluded from the scope of the ATS and is also inconsistent with the ATS's text and early interpretations. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 691-701 (2002).

stands in sharp contrast to the first clause of Section 9, which gave the district courts jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States, *committed within their respective districts, or upon the high seas* . . . ." 1 Stat. at 76-77 (emphasis added). In the late-18th Century, tort actions were considered to be transitory and could be brought wherever the tortfeasor was found. *See Mostyn v. Fabrigas*, 98 Eng. Rep. 1021 (K.B. 1774) (Mansfield, C.J.). The established rule in criminal cases, by contrast, was that "[c]rimes are in their nature local, and the jurisdiction of crimes is local." *Rafael v. Verelst*, 96 Eng. Rep. 621, 622 (C.P. 1776) (De Grey, C.J.). Oliver Ellsworth had applied the doctrine of transitory torts as a judge in Connecticut, *see Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.) ("Right of action [for a tort] against an administrator is transitory, and the action may be brought wherever he is found."), and the text of the ATS simply reflects his understanding that the district courts would have jurisdiction over torts in violation of the law of nations regardless of where those torts occurred.

Attorney General Bradford's 1795 opinion confirms that suits for torts in violation of the law of nations that occurred abroad could be brought in district court under the ATS. As was discussed above, Bradford was asked what actions might be taken against Americans who had helped the French attack the British colony of Sierra Leone. Reflecting the common understanding of criminal jurisdiction, he first noted that "[s]o far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." 1 Op. Att'y Gen. at 58. But

Bradford proceeded to contrast the jurisdiction of United States courts over tort actions, stating that "there can be no doubt" that the injured aliens "have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." *Id.* at 59.

Bradford clearly did not think that the presumption against extraterritoriality limited the district courts' jurisdiction under the ATS, although this presumption was well established at the time. *See, e.g., Rose v. Himely*, 8 U.S. (4 Cranch) 241, 279 (1808); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824). The simple explanation is that the ATS did not provide for the extraterritorial application of United States law. Instead, it provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world—the law of nations. A district court hearing a suit based on a tort in violation of the law of nations that occurred in Sierra Leone would not be prescribing rules of conduct for parties in a foreign country but would rather be enforcing rules of law that were as binding in Sierra Leone as they were in the United States.[16] It was

[16] In modern terms, the United States' argument based on the presumption against extraterritoriality makes the mistake of confusing jurisdiction to adjudicate with jurisdiction to prescribe. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1986) (distinguishing jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce). The European Commission's argument that jurisdiction under the ATS should be defined by reference to customary international law limits on jurisdiction to prescribe rests on the same misunderstanding. *See* Brief of *Amicus Curiae* the European Commission in Support of Neither Party 12-26.

not at all unusual for courts at that time to hear cases that arose abroad. Alexander Hamilton noted:

> The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.

THE FEDERALIST NO. 82, at 491, 493 (A. Hamilton) (C. Rossiter ed., 1961); *see also* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, *supra*, at 556 (J. Marshall) ("If a man contracted a debt in the East Indies, and it was sued for here, the decision must be consonant to the laws of that country."). In 1789, as today, U.S. courts would decide cases that arose abroad without any suggestion that they were exercising an impermissible, "extraterritorial" jurisdiction.

B. THE FIRST CONGRESS EXPECTED THE LAW OF NATIONS TO EVOLVE.

The argument that jurisdiction under the ATS should be limited to those torts in violation of the law of nations that were recognized in 1789 is also contrary to the First Congress's understanding. Statesmen of that era understood that the law of nations had evolved and would continue to do so. In discussing the rights of neutral traders, Secretary of State Thomas Jefferson referred to "the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of

every civilized Nation." Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), *in* 7 THE WORKS OF THOMAS JEFFERSON 312, 314 (P.L. Ford ed., 1904). Justice Wilson similarly declared in *Ware v. Hilton*, 3 U.S. (3 Dall.) 199 (1796), that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Id.* at 281 (Wilson, J., concurring); *see also* Proclamation of Neutrality (Apr. 22, 1793), *in* 32 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 430-31 (J.C. Fitzpatrick ed., 1939) (referring to "the modern usage of nations"); Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Jay, *Law of Nations*, *supra*, at 824 (noting that the law of nations had been expounded "with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning"). Justice Story captured the late-18th Century understanding of the law of nations when he wrote: "It does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations." *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), *overruled on other grounds*, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

If the First Congress had wanted to limit the district courts' jurisdiction under the ATS to existing violations of the law of nations, it could have enumerated them just as Blackstone had. 4 BLACKSTONE, *supra*, at *68. When the Continental Congress made its recommendation to the States in 1781, it did list several violations of the law of

nations but took care not to make the list exclusive, specifically recommending that each State appoint a tribunal "to decide on offences against the law of nations, not contained in the foregoing enumeration." 21 JOURNALS OF THE CONTINENTAL CONGRESS, *supra*, at 1137. It was in this same spirit, and with the understanding that the law of nations had evolved and would continue to do so, that the First Congress expressly provided that the district courts were to have jurisdiction over "*all* causes where an alien sues for a tort only in violation of the law of nations." 1 Stat. at 77 (emphasis added).

CONCLUSION

The history and text of the ATS establish that no further congressional authorization is necessary for aliens to bring suit and that jurisdiction under the ATS extends to "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."

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